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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ATOMIC COMPANY,

Appellant,

v.

UNITED NUCLEAR CORPORATION AND

INDIANA & MICHIGAN ELECTRIC COMPANY,

Appellees.

On Appeal from the Supreme Court of New Mexico

MOTION OF UNITED NUCLEAR CORPORATION TO DISMISS OR AFFIRM

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March 18, 1981

QUESTIONS PRESENTED

1. Whether Appellant has drawn in question the validity of a state statute under federal law in the manner required for this Court to have jurisdiction on appeal pursuant to 28 U.S.C. §1257(2)?

2. Whether a judgment entered by the court below on May 7, 1979 was a final judgment for purposes of 28 U.S.C. §1257, so that the appeal to this Court is untimely insofar as it relates to that judgment?

3. Whether Canada's regulation of the export of uranium mined in Canada precluded any jurisdiction in the New Mexico courts, under the act of state doctrine or for foreign policy reasons, to conduct discovery concerning an international cartel of uranium producers — of which Gulf Oil Corporation, one of Appellant's constituent partners, was a member — and actions pursuant thereto performed within the United States by American companies even though:

(a) Such issues and information relating thereto were relevant to Appellee's claims that certain domestic uranium supply agreements, which Appellant sought to enforce against it, were void and unenforceable as a part of a conspiracy by Appellant and others in violation of the New Mexico antitrust law and by reason of fraud, breach of fiduciary duties, economic coercion and commercial impracticability brought about by such conspiratorial actions, and

(b) Appellant concedes in this Court that Appellee could "show the existence of * * * the cartel, as background and motivation for anti-competitive activities taken by General Atomic and Gulf in this country," and that "[n]o foreign government required any such alleged acts, and General Atomic and Gulf claim no immunity with respect to them"?

4. Whether Canada's regulation prohibiting disclosure of cartel documents located in Canada precluded any jurisdiction in the New Mexico courts, under the act of state doctrine or for foreign policy reasons, to conduct discovery of cartel information, even though (a) discovery was required before the enactment of the Canadian regulation and (b) after enactment, Appellant was directed that it should not violate the Canadian regulation?

5. If the issue is timely (see Question 2), whether the New Mexico courts lost jurisdiction to proceed further with the case after April 2, 1976, by reason of an injunction entered on that date which this Court subsequently set aside insofar as it restrained Appellant from proceeding in federal forums including arbitration, even though (a) this Court has also upheld the jurisdiction of the New Mexico trial court to enter a judgment on December 27, 1977 refusing to stay the trial pending arbitration and to make findings in connection therewith that arbitration had been waived and that there were no arbitrable issues, and (b) this Court also has denied a petition by Appellant for a writ of certiorari to review the May 7, 1979 judgment of the New Mexico Supreme Court affirming the trial court?

6. Whether, after numerous hearings, the New Mexico courts deprived Appellant of due process of law by entering a default judgment as a sanction for Appellant's massive bad faith, persisting throughout the proceedings in the trial court and evident from the record in that court, in failing to comply with discovery orders concerning information relevant to the critical issues in the case?

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MOTION OF UNITED NUCLEAR CORPORATION TO DISMISS OR AFFIRM

Appellee United Nuclear Corporation (UNC)[1] hereby moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of New Mexico. To the extent the Jurisdictional Statement is treated as a petition for writ of certiorari pursuant to 28 U.S.C. §2103, UNC urges denial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the provisions already set forth (J.S. Const. & Stat. App.),[2] 28 U.S.C. §1257(3) and Rule 54(b) of the New Mexico Rules of Civil Procedure are involved in this case. See Statutory Appendix, *infra*.

STATEMENT OF THE CASE

General Atomic Company (GAC) seeks plenary review of the affirmance by the New Mexico Supreme Court of a default judgment entered against GAC because of its persistent bad faith failures to comply with discovery orders. Despite GAC's rhetoric, there are no substantial "act of state" or "foreign affairs" or "due process" issues in this case. "This case involves nothing more than an inquiry into what an *American* corporation has done in *America*," and "whether a state court in this country will lend its judicial processes to the enforcement of contracts entered into in the United States by corporations based in this country for the supply of a resource to be mined and milled in the United States" (A. 68a). GAC was accorded complete due process and its "failures to make good faith discovery are 'mirrored in the record' " (A. 168a). A comparison of the Jurisdictional Statement with the comprehensive opinion of the New Mexico Supreme Court (A. 1a-205a) reveals that the

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[1] United Nuclear Corporation is a subsidiary of UNC Resources, Inc. It has no subsidiaries or affiliates within the meaning of Rule 28.1.

[2] Citations in this motion follow these conventions: Jurisdictional Statement (J.S.); Appendix to Jurisdictional Statement (A.); Appendix to this motion (M.A.); Brief of Canada (Br.).

questions raised by GAC are in large measure not truly presented by this case, but rather are based upon mischaracterizations of the facts and are otherwise insubstantial.

GAC's mischaracterizations of what this case is about are epitomized by the introduction (J.S. 4-6) to its "Statement of the Case." By ignoring factual findings which it does not contest here, GAC represents that it was defaulted because of its "inability to produce cartel documents that could not be obtained without violating Canada's criminal law" (*id.* 4). But the opinion below demonstrates that GAC was defaulted because, in bad faith defiance of discovery orders and its own agreements, it deliberately concealed vital information available to it without violating Canadian law. The judgment below did not rest upon the "court's assumption of jurisdiction to inquire into and judge the legality of a multi-nation marketing arrangement entered into by Canada as a governmental regulatory action" (J.S. 4); the courts below neither questioned nor attempted to adjudicate the validity of the laws or actions of Canada. Canada's "official representations" to the New Mexico courts were not "rejected or ignored" (J.S. 4, 5); insofar as properly submitted, they were fully considered and credited.

What the New Mexico courts did was to inquire into "anti-competitive activities allegedly taken by General Atomic and Gulf in the United States," which GAC now concedes "[n]o foreign government required" and as to which it "claim[s] no immunity" (J.S. 10 n.5), and to default GAC for its bad faith refusals to make discovery of relevant information available to it without violating Canadian law. In so doing, the New Mexico courts followed the law established by this and other federal courts.

A. Summary of Proceedings Below

In 1975, UNC sued GAC in the Santa Fe, New Mexico, district court. The complaint alleged that a uranium supply contract (the 1973 Supply Agreement) was void as a result of fraud, economic coercion, breach of fiduciary duties and violations of the New Mexico Antitrust Act. The complaint also

alleged that commercial impracticability excused performance (see A. 32a-33a).[3] Discovery commenced immediately. On April 2, 1976, the trial court enjoined GAC from instituting proceedings in other forums (including arbitration), which order (A. 295a-298a) was set aside by this Court insofar as applicable to proceedings in federal forums. *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) (*Felter I*). Although never prohibited from doing so, GAC did not move to stay the trial pending arbitration until November 30, 1977, after almost two years of vigorous litigation including a month of trial (A. 215a, 227a). That motion was denied in a December 27, 1977 partial final judgment (A. 309a-319a), on the grounds that GAC had waived any right to arbitration and that no issues were arbitrable in any event. The trial court also enjoined GAC from pursuing arbitration in a December 16, 1977 partial final judgment (A. 299a-308a). In *General Atomic Co. v. Felter*, 436 U.S. 493 (1978)(*Felter II*), this Court set aside the December 16, 1977 judgment as a violation of its mandate in *Felter I*, but expressly denied GAC's further request that it set aside the December 27, 1977 judgment, finding that it did not violate that mandate. The N.M. Supreme Court affirmed the December 27 judgment in a May 7, 1979 decision, 93 N.M. 105, 597 P.2d 290 (1979) (A. 206a-248a), and this Court denied GAC's petition for writ of certiorari, 444 U.S. 911 (1979).

In the meantime, discovery and trial had proceeded until the trial court on March 2, 1978 entered a Sanctions Order and Default Judgment against GAC (A. 249a-270a, as amended March 27, 1978).[4] That order, entered under Rule 37, N.M.

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[3] In April 1976, the complaint was amended to include claims that a 1974 agreement between UNC and GAC was void upon similar grounds. On May 5, 1976, GAC answered and counterclaimed for specific performance of the 1973 and 1974 Supply Agreements or damages for their breach and for an alleged UNC violation of the New Mexico antitrust laws.

[4] GAC attempted to hold off the entry of the Sanctions Order and Default Judgment by filing two petitions for writ of mandamus and prohibition with the N.M. Supreme Court, which were denied on January 11 and March 2, 1978. It immediately filed in this Court an application for stay of trial court proceedings, and two petitions for writ of certiorari (Nos. 77-1236 and 77-1269) seeking review of the N.M. Supreme Court rulings of January 11 and March 2, 1978. The application and petitions were denied. *General Atomic Co. v. Felter*, 435 U.S. 920 (1978); 436 U.S. 904 (1978).

Rules of Civil Procedure (substantially similar to Federal Rule 37), was based upon 48 detailed recitals (A. 251a-265a) describing GAC's "utmost bad faith in all stages of the discovery process" (A. 250a). It directed that judgment by default, except on damages, be entered against GAC in favor of UNC and third-party defendant Indiana & Michigan Electric Co. (I&M) (A. 269a; see A. 271a). An April 4, 1978 declaratory judgment (A. 271a-273a) voided the UNC-GAC uranium supply agreements, and after trial on damages, a May 17, 1978 judgment (A. 274a-276a) awarded UNC net damages of $236,425.

On August 29, 1980, the N.M. Supreme Court affirmed those default judgments, insofar as is relevant here, in a thorough and well-reasoned opinion (A. 1a-205a; rehearing denied October 23, 1980, A. 429a).[5] After an "exhaustive examination of the record" (A. 204a), the Court affirmed that "GAC had acted in bad faith throughout the discovery process and that the [trial] court did not, in the face of such misconduct, abuse its discretion in entering the sanction of default judgment" (*id.*). "The trial court's conclusion that GAC pursued a persistent policy of delay and resistance is supported by the record; indeed, that conclusion is inescapable" (*id.*).

B. The Background of the Dispute

From 1971 to 1973, UNC and Gulf Oil Corporation (Gulf) were co-owners of a joint venture corporation known as Gulf-United Nuclear Fuels Corp. (GUNF), formed to manufacture and sell nuclear fuel for commercial reactors.[6] Gulf controlled GUNF through its majority on the GUNF board of directors.

Unbeknownst to UNC, Gulf became a charter member of a uranium cartel during this period.[7] In 1972, after the cartel had

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[5]The Court did reverse and remand a portion of the judgment relating to I&M, finding that certain I&M-GAC contract issues relating to remedies were not foreclosed by the default. A. 202a-204a.

[6]By 1971, Gulf had purchased properties containing huge uranium ore reserves in New Mexico and Canada. UNC was and is the largest independent producer of uranium in the United States. All of UNC's uranium mines are in New Mexico.

[7]In *United States v. Gulf Oil Corporation*, Criminal No. 78-123 (W.D. Pa.), Gulf pleaded *nolo contendere* in May, 1978, to a federal criminal antitrust information relating to Gulf's cartel activities. M.A. 1-7.

formed and adopted detailed rules of operation, the Canadian government approved regulations governing prices at which uranium could be exported from Canada (A. 56a-57a n.45). Top executives of Gulf, who were on the board of GUNF and who later became key personnel of GAC, attended cartel meetings at which the adverse impact of the cartel on GUNF was discussed (A. 13a, 34a, 37a). Gulf did not inform UNC of its role in the cartel (A. 38a) and deliberately housed its cartel documents in Canada to maintain secrecy and impede discovery by U.S. courts (A. 156a-159a).

In determining that cartel information could be "crucial to the proper resolution of this litigation" (A. 33a), the N.M. Supreme Court noted evidence that the cartel members had resolved to eliminate all non-member competition from uranium producers such as UNC and fuel fabricators such as Westinghouse and GUNF (A. 34a-36a). Gulf executives on the GUNF board, who later negotiated the contracts involved here,.contemporaneously participated in cartel activities and sought to "tie up" all "low cost [uranium] supplies now on market" (A. 34a). Gulf's stated objective during this period was to "minimize UNC's book income" (A. 35a). Gulf's "overall strategy" was to apply the cartel policies in the "domestic market" of the United States and to defer its own New Mexico uranium production in order to maximize its future profits (A. 35a-36a).

The N.M. Supreme Court found "most striking of all * * * 'the consensus,' reached by the cartel in the context of discussing an American corporation, 'to delineate where the competition was and the nature of its strength as a prelude to eliminating it once and for all' " (A. 40a). Based upon the cartel evidence partially summarized above, the Court concluded "[t]hese things are not the stuff of which antitrust irrelevancy is made" (*id.*).

UNC contended that, after the cartel was formed, Gulf denied GUNF the capital and uranium it had agreed to furnish, that GUNF began to sustain large losses, and that UNC was economically coerced into selling its interest in GUNF to Gulf at

a large loss and into signing the 1973 Supply Agreement (A. 32a-33a, 43a-44a).[8] Although Gulf had agreed that any such sale would be done "entirely in good faith, on a fair basis, and free of any secret or undisclosed arrangements" (A. 38a), Gulf never revealed its cartel role to UNC (*id.*). Later in 1973, GUNF was merged into Gulf. Effective January 1, 1974, Gulf and Scallop Nuclear Inc. formed the GAC partnership, which succeeded to the assets and liabilities of Gulf's nuclear businesses.[9] Gulf assigned the 1973 Supply Agreement to GAC shortly thereafter, and later UNC and GAC entered into the 1974 Supply Agreement calling for UNC to supply an additional three million pounds of uranium.

C. Appellant's Discovery Failures

On the day the action was filed (December 31, 1975), UNC served a comprehensive set of interrogatories, seeking, *inter alia*, information from GAC and Gulf about all "negotiations" and "agreements" pertaining to the "marketing and sale" of uranium (A. 98a & n.80, 99a, 110a-116a). The information sought encompassed cartel materials (A. 116a-124a) and was "crucial" to UNC's claims of fraud, breach of fiduciary duties, commercial impracticability and antitrust violations (A. 33a). Despite extensions, GAC failed to file timely answers or objections to the interrogatories (A. 100a-101a).[10] On March 12, 1976, in return for UNC's withdrawal of an application for default, GAC and Gulf agreed in writing to "answer in good faith the interrogatories" and to produce to UNC any written materials referred to or required by the interrogatories from GAC and its constituent partners (A. 102a-103a & n.85).

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[8] That agreement called for UNC to supply Gulf with approximately 24 million pounds of uranium over a period of years.

[9] GAC simply took over the business formerly conducted by Gulf, operating an "identical business in identical offices, with the same records, and with largely the same personnel." A. 27a. As found below, Gulf's uranium businesses, whether conducted by GAC, Gulf Energy, Gulf Minerals or Gulf Canada were inextricably interrelated as "a coordinated, comprehensive uranium business." A. 26a; see A. 8a, 27a-28a.

[10] New Mexico courts follow the established rule that "the failure to timely file objections to interrogatories operates as a waiver of any objections the party might have." A. 110a.

On April 5, 1976, GAC filed "wholly inadequate and evasive" answers to the interrogatories (A. 103a, 110a-111a). Although the GAC vice-president who verified GAC's answers was involved in the cartel, all information relating to the cartel was omitted from GAC's answers (A. 118a, n.99). GAC subsequently excluded all Gulf documents in its initial document production (A. 104a, 116a-117a).

The New Mexico courts specifically held that cartel information was called for by the first set of interrogatories and the March 1976 agreement to produce (A. 110a-111a, 116a-124a), and that GAC's unilateral decision not to provide Gulf information (A. 105a) — explicitly called for by the interrogatories and agreement (A. 110a-117a) — "constituted bad faith" (A. 112a).[11] The record thus establishes that UNC requested the cartel documents nine months before the promulgation of the Canadian Uranium Information Security Regulations (September 23, 1976) which GAC relies on here, and that GAC in bad faith refused to produce the documents while no law in Canada prohibited such production. As the N.M. Supreme Court found, "[h]ad GAC been more assiduous in its responsibility in discovery prior to September 23, 1976, Canadian cartel discovery could have been made without any serious foreign law entanglements" (A. 125a). The Court noted the irony of GAC's position in "failing to provide cartel information prior to passage of Canadian Uranium Information Security Regulations, and then relying on these Regulations as an excuse for nonproduction" (A. 125a-126a; see generally A. 111a-118a).

After an evidentiary hearing on UNC's second application for default filed August, 1976, the trial court on November 30, 1976 ordered GAC to provide adequate answers to UNC's first

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[11] In August 1976, UNC again moved for default judgment by reason of GAC's discovery failures. At hearing, UNC pointed out, among other things, that documents produced to date indicated participation by GAC-Gulf in an uranium cartel. A. 121a & n. 104, 122a. Hence, GAC's suggestion that it was not until August 1977 that it was put on notice that UNC sought the production of cartel documents (J.S. 7) is erroneous, even apart from the fact that UNC's first set of interrogatories covered cartel information and that UNC filed specific cartel discovery requests in February 1977. A. 107a & n. 88, 108a, 119a-120a.

interrogatories and to produce Gulf documents (A. 106a). There followed numerous hearings and orders of the trial court, necessitated by GAC's continued resistance to discovery and persistent relitigation of meritless objections (A. 106a-109a). During this period, two utilities, I&M and Detroit Edison, were joined as parties on GAC's motion. GAC repeatedly misrepresented to the court that it lacked sufficient custody or control to produce Gulf documents (A. 106a, 114a), but finally produced some Gulf documents in March 1977 (A. 108a-109a). In GAC's supplemental answers to UNC's first interrogatories (filed April 15, 1977), "not a single word was said of the cartel or Gulf's role in it, nor was there any claim that cartel documents were privileged, irrelevant, or protected from disclosure by Canadian law" (A. 109a; see also A. 119a-122a).

Because of the inadequacies of GAC's answers and document production, UNC on August 16, 1977 served its second set of interrogatories and a motion to produce specifically directed to cartel information (A. 129a, 136a). GAC agreed to produce responsive documents and to provide answers utilizing all available sources of information, including senior Gulf management in Canada (A. 130a, 140a). GAC filed its answers on September 26, 1977, the greater portion of which were adjudged to be inadequate and unacceptable (A. 137a-143a), in part because they consisted of references to materials that were " 'elusive and non-responsive' " (A. 138a). In its answers, GAC for the first time raised the contention that disclosure of the requested cartel information would violate the Canadian Uranium Information Security Regulations, promulgated a year earlier (A. 131a). GAC did not timely object to discovery on that ground, as required by New Mexico law (A. 129a, 140a-141a), which failure "was itself evidence of a lack of good faith" (A. 141a). It did not identify or include information on cartel documents in Canada or report any effort to comply with its duty to seek Canada's consent to disclosure of information covered by the Canadian regulations, even though waivers were then expressly permitted (A. 139a-143a). UNC moved for an order compelling complete discovery, and, at a hearing on October 7, 1977, GAC stated that "every document" in the United States that was responsive had been produced (A. 131a). That statement was false (*id.*) and "could not be made in good faith" (A. 163a).

An October 11, 1977 order required GAC to answer again and " 'separately, clearly and definitively' identify all documents," whether or not housed in Canada (A. 132a), but required production of documents only "[i]nsofar as it is lawful so to do" (A. 70a). The trial court further directed GAC to make "an immediate diligent and good faith effort to obtain a lawful waiver of or dispensation from" Canadian regulations to the extent they prohibited production of documents located in Canada, and reiterated prior warnings that "further failures to abide by its orders to make good faith discovery would subject the offending party to sanctions" (A. 132a). On October 20, 1977, GAC filed a second set of answers to the second set of interrogatories. GAC again failed to identify or produce cartel documents located in Canada, and, "contrary to its earlier representation, [stated that] it would not provide information from persons in Canada" (A. 143a).

UNC moved again, on November 4, 1977, for an order compelling production and identification of the documents and imposing sanctions. Among other allegations of bad faith, UNC charged that GAC had "courted legal impediments" by secreting cartel documents in Canada, in the hope, later realized, that they would be beyond the process of U.S. courts (A. 133a). The N.M. Supreme Court affirmed the trial court's findings in this regard and concluded that Gulf's "unusual" and "deliberate" policy of transferring cartel documents from the U.S. to Canada and storing cartel documents there "amounted to courting legal impediments to their production" (A. 158a-159a).[12] After an evidentiary hearing on bad faith (A. 155a), the trial court issued a November 18, 1977 order finding that GAC's failure to produce was "caused in part, by its own early and deliberate policy of housing such documents in Canada" (A. 292a; see A. 133a, 155a).[13]

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[12] For a thorough review of the evidence on this issue, see A. 154a-159a.

[13] GAC asserted that the Ontario Business Records Protection Act [1947, Ont. Rev. Stat. c. 54 (1970)] barred the production of documents in Canada, but abandoned that contention on appeal. A. 124a-125a. However, it was the anticipated benefits of the Act that provided the initial motivation for Gulf to select Canada as its cartel document depository. A. 158a-159a. GAC's repeated reliance on that Act, without explanation, before finally conceding on appeal that "it is no impediment to discovery" (A. 124a), also showed "callous disregard of responsibilities owed by GAC and its counsel to the court and to the adversary parties." A. 125a.

A December 27, 1977 order, in response to a motion by I&M to compel further answers to UNC's second set of interrogatories, again directed GAC to answer, finding that GAC "had not complied with previous orders to provide 'complete, good faith and non-evasive answers'" (A. 134a). The trial court warned GAC that, if it failed or refused to comply, any aggrieved party could apply for appropriate sanctions under Rule 37 (*id*).[14] On February 2, 1978, GAC filed its third set of answers to those interrogatories. These answers were also found to be "inadequate" (A. 143a), as GAC violated the express terms of the October 11, 1977 order by failing to commit itself to a set of facts even when documents and other information were available to it (A. 143a-145a). In addition, in spite of its continuing obligation to produce relevant documents, GAC failed to produce certain cartel documents located in the United States or to reveal their existence to the court or the parties until UNC learned, after trial had commenced, of their availability from other sources (A. 159a-165a).

Accordingly, on February 10, 1978, UNC, joined by I&M, moved again for default judgment based on GAC's accumulated bad faith violations of discovery orders (A. 134a). The trial court entered its Sanctions Order and Default Judgment on March 2, 1978 (see pp. 3-4, *supra*).

Manifestly, therefore, GAC was not defaulted for its "inability to produce documents that could not be obtained without violating Canada's criminal law" (J.S. 4), but, rather, for its repeated failures to adequately respond to both sets of UNC's interrogatories and related requests to produce insofar as could have been accomplished without violating Canadian law. This "misconduct precluded a full and fair trial of the issues in the case" (A. 165a). In short, this case exemplifies the "most fundamental postulate of our legal system — that before the law,

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[14] During this period, two diplomatic notes from the Government of Canada were transmitted to the trial court by the Department of State. A. 446a-450a. In transmitting those notes, the Department of State stated that it was taking "no position with regard to any of the issues raised in either of the two notes," and that "[t]ransmittal of these documents should not be understood as having implications with respect to the foreign affairs of the United States" A. 446a.

all stand equal," and hence that the "rules of discovery are as equally applicable to cases involving large sums as they are to small; and the obligation to comply with those rules in good faith and to obey the orders of the court is no less incumbent on the largest company than it is on the poorest citizen" (A. 179a).

THE COURT DOES NOT HAVE APPEAL JURISDICTION AND APPELLANT'S SECOND QUESTION IS UNTIMELY

While GAC asserts that its "federal questions were timely and properly raised in the New Mexico courts" (J.S. 3), it makes no effort to and cannot sustain its burden[15] of establishing that those federal questions are reviewable on appeal, rather than on petition for writ of certiorari. Moreover, insofar as GAC requests review of issues decided by the May 7, 1979 judgment of the N.M. Supreme Court, that was a final judgment as to which a petition by GAC for writ of certiorari has been denied, and GAC's present request is untimely.

1. **The validity of a state statute has not been drawn into question.** In order for this Court to have jurisdiction on appeal from a final judgment of the highest court of a state, it is not enough that a federal question was raised in or decided by that court. There must also have been "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. §1257(2).

An "explicit" objection to the validity of a state statute as applied must be made both in the state courts and in the appeal to this Court for the appeal to lie. *Charlestown Assn. v. Alderson*, 324 U.S. 182, 185, 187 (1945). Contentions that appellant is not subject to a statute because of federal rights or has been deprived of such rights are insufficient to draw into question the validity of a state statute, even if they could have afforded a basis for attacking the validity of the statute as applied. *Hanson v. Denckla*, 357 U.S. 235, 244 (1958); *Memphis*

[15] See, *e.g.*, Rule 15.1(g) of this Court; *Street v. New York*, 394 U.S. 576, 581-582 (1969).

Gas Co. v. Beeler, 315 U.S. 649, 650-651 (1942); *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 259 (1920).[16]

GAC has not supported its assertion (J.S. 2) that it "drew in question the validity as applied" of the New Mexico Antitrust Act and Rule 37, N.M.R. Civ. P., and it cannot do so. Rather, its discussion of "Raising the Federal Question" (J.S. 3-4) refers only to assertions that the courts below denied claims of federal rights. Neither in that discussion nor in the portions of the record cited therein, including the opinion below (A. 46a-73a, 165a-179a), is there any reference to the invalidity of a state statute as applied. And, neither the Questions Presented by GAC here nor its argument as to why they are substantial (J.S. 15-30), explicitly attack the validity of a state statute, which is sufficient in itself to prevent jurisdiction on appeal, regardless of how the issues were phrased in the state courts. *Charlestown Assn. v. Alderson, supra*, at 187.[17]

2. **GAC's request for review of the May 7, 1979 judgment below is untimely, whether on appeal or on certiorari.** In that judgment (A. 206a-248a), the N.M. Supreme Court affirmed a partial final judgment (A. 309a-319a), entered pursuant to Rule 54(b), N.M.R. Civ. P., in which the trial court denied GAC's motion for a stay of trial pending arbitration. In that appeal, GAC contended, among other things, that the trial court's retention of jurisdiction conflicted with this Court's *Felter* decisions (see p. 25, *infra*). Rather than ignoring that contention, as GAC now asserts (J.S. 3-4, 14), the N.M. Supreme Court concluded that the trial court judgment was

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[16] See also, *e.g.*, *Addington v. Texas*, 441 U.S. 418, 422-23 (1979); *Kulko v. California Superior Court*, 436 U.S. 84, 90 n.4 (1978); Stern & Gressman, *Supreme Court Practice* 160-165 (5th ed. 1978); Wright, Miller, Cooper & Gressman, 16 *Federal Practice and Procedure* §4012, at 613-19 (1977); 12 *Moore's Federal Practice* ¶514.01, at 8-88 to 8-89 (2d ed. 1980).

[17] Even if this Court had jurisdiction on appeal of one or more of the questions presented by GAC, other nonappealable issues should be regarded as being before this Court on petition for writ of certiorari. See, *e.g.*, *Holding v. Blankenship*, 387 U.S. 94 (1967); *Mishkin v. New York*, 383 U.S. 502, 512 (1966); Stern & Gressman, *supra*, at 169-72. We note that Question Nos. 2 and 3(c) presented by GAC (see J.S. 23-26, 29-30) do not involve an application of the New Mexico Antitrust Act or Rule 37, and thus GAC could not have drawn in question the validity of those statutes as applied in regard to those issues, and in fact it has not done so in regard to any of the issues presented here.

consistent with the *Felter* decisions (A. 238a-239a). GAC sought review by this Court in a petition for writ of certiorari in which it invoked this Court's jurisdiction under 28 U.S.C. §1257(3) (M.A. 17), which — as is also true of an appeal under §1257 — requires that the judgment below be "final."[18] While opposing the petition, UNC and I&M did not question this Court's jurisdiction under §1257(3) (M.A. 118 & 189-205). This Court denied the petition at 444 U.S. 911 (1979).

The jurisdictional issue was not raised again on appeal from the default judgment (see J.S. 3-4) or reconsidered by the N.M. Supreme Court in its August 29, 1980 decision. If the May 1979 judgment was "final" for purposes of §1257, plainly the time in which to seek review of that judgment and the rulings made therein has long since expired. 28 U.S.C. §2101(c); Rules 11,12 & 20 of this Court. Nonetheless, GAC seeks to raise the same jurisdictional issue in the second question now presented, and has done so without attempting to explain why the May 7, 1979 judgment — despite GAC's prior assertions to the contrary — was not final, or otherwise to justify the timeliness of the present request for review of that issue. In any event, no such justification is possible. In addition to the cases cited by GAC in its prior petition (n. 18), the finality of the May 7, 1979 judgment is consistent with *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), and follows *a fortiori* from *Packinghouse Workers v. Needham*, 376 U.S. 247, 249 n.1 (1964).[19] The rule of finality bars GAC from now relitigating in this Court the validity of the May 7, 1979 judgment. *E.g., Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507 (1950).

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[18]GAC then asserted that the May 7, 1979 judgment "is subject to no further review in New Mexico's court system. Further, the subject of the decision — GAC's right to federal arbitration — is a separate and independent matter, anterior to the merits of the underlying controversy between UNC and GAC, and not enmeshed in the factual and legal issues comprising UNC's cause of action. The New Mexico Supreme Court's decision is, therefore, a 'final judgment' for purposes of this Court's jurisdiction under 28 U.S.C. §1257. *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963); *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n.3 (1976). *See Local No. 438, Construction and General Laborers' Union v. Curry*, 371 U.S. 542, 548-52 (1963)." M.A. 40 n.21.

[19]This Court has stated that Rule 54(b), Fed. R. Civ. P., "has lent welcome certainty to the appellate procedure. * * * A party adversely affected by a final

THERE IS NO SUBSTANTIAL FEDERAL QUESTION THAT WARRANTS PLENARY REVIEW EITHER ON APPEAL OR ON WRIT OF CERTIORARI

GAC's unsupported efforts to proceed here by appeal and even to include an issue previously decided in a final decision as to which GAC unsuccessfully sought certiorari are symptomatic of the weaknesses of GAC's case. Insofar as is pertinent here, the N.M. Supreme Court applied accepted principles of federal law; there is no conflict of decisions and no issues which have not been, but should be, decided by this Court or which otherwise would justify plenary review.

A. There Is No Substantial Issue as to the Act of State Doctrine or any Related Doctrines of Federal Law

Apart from the puffery in subpart A dealt with in the margin,[20] Part I of GAC's argument essentially contends that the ruling below violates the "controlling constitutional principles of the act of state doctrine and the rule of *Zschernig v. Miller*," 389 U.S. 429 (1968). J.S. 22. As the N.M. Supreme

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decision * * * knows that his time for appeal will *not* run against him until [the Rule 54(b)] certification has been made." *Sears, Roebuck & Co. v Mackey*, 351 U.S. 427, 435-36 (1956). New Mexico Rule 54(b) is an analogue of the federal rule and manifestly serves the same purpose. GAC knew from the Rule 54(b) certification (made at its request) that its time to appeal began to run, and it took full advantage of its rights by appealing to the N.M. Supreme Court and petitioning this Court for writ of certiorari. See Wright, Miller, Cooper & Gressman, *supra*, §4010, at 596.

[20] GAC's contention (J.S. 15-16) that *Ex Parte Peru*, 318 U.S. 578 (1943), establishes "*a fortiori* that Canada's repeatedly expressed deep concern over interference by American courts with its right to regulate its own resources justifies review here" (J.S. 16) is another example of GAC's propensity for exaggeration. Expressions of concern by Peru were not the basis of this Court's decision to grant an extraordinary writ and hold that Peru's sovereign immunity prevented the lower court from attaining *in rem* jurisdiction through seizure of a Peruvian ship. Rather, it was the "recognition and allowance of the [sovereign immunity] claim by the State Department" which had to "be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the conduct of our foreign relations." 318 U.S. at 588-589. In the "absence of recognition of the immunity by the Department of State," the lower court would have "had authority to decide for itself whether all the requisites for such immunity existed." 318 U.S. at 587.

Court pointed out (A. 46a-47a) those issues arise in two separate contexts: (1) the role of Canada in the uranium cartel itself and (2) the Canadian Uranium Information Security Regulations. GAC's arguments generally seek to obscure that distinction, but for the most part those arguments appear to relate to Canada's role in the cartel.

1. In order to prevail in that first context, GAC must establish that Canada's role in the cartel was such that, under act of state or *Zschernig*, "adjudication of any issues regarding the cartel, and therefore discovery orders directed at cartel-related information and documents, are barred" (A. 19a), or, as GAC puts it (J.S. 22), that "the state courts lacked jurisdiction" so that "the question of discovery does not even arise." The insubstantiality of all of GAC's arguments in that regard is patent from a concession by GAC, tucked away in a footnote to its Statement of the Case (J.S. 10 n.5), that:

> "General Atomic and Gulf * * * take the position that state and federal courts may not judge the legality of actions taken in foreign countries pursuant to governmental direction. *But plaintiffs may show the existence of such regulation, including the cartel, as background and motivation for anticompetitive activities allegedly taken by General Atomic and Gulf in the United States. No foreign government required any such alleged acts, and General Atomic and Gulf claim no immunity with respect to them* but rather wish to go to trial to disprove those charges." (Emphasis added.)

Plainly, if UNC was entitled to prove the existence of the cartel and anti-competitive activities taken in the United States, it was entitled to relevant discovery so that the trial which GAC assertedly wanted would be fair.

2. Much of the N.M. Supreme Court's discussion of the law as it relates to Canada's role in the cartel (A. 47a-69a) was directed to establishing the proposition which GAC's footnote now concedes. Thus, the Court concluded that, under the act of state doctrine, it "is for the courts of this country, and not the government of a foreign state, to determine whether *our*

nationals took action in *our* nation in violation of *our* laws" (A. 53a); that "[t]his case involves nothing more than an inquiry into what an *American* corporation has done in *America*, a situation which finds no appropriate analogy in *Zschernig*" (A. 68a); that "[t]he states of this country * * * have every conceivable interest in anti-competitive conduct by American corporations occurring within their own borders," while "foreign governments * * * have no legitimate interest in whether a state court in this country will lend its judicial processes to the enforcement of contracts entered into in the United States by corporations based in this country for the supply of a resource to be mined and milled in the United States" (*id.*); so that "neither *Zschernig* nor the act of state doctrine precludes the courts of New Mexico from litigating the cartel-related issues in this case, or from seeking the production of documents which will facilitate the resolution of such litigation" (A. 69a).

In reaching those conclusions, the Court applied the "classic definition of the act of state doctrine" in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (A. 47a), reaffirmed in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964), under which "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Thus, since UNC "alleged that GAC and Gulf sought to eliminate it as a competitor in the United States and to monopolize American uranium reserves," and "that the 1973 and 1974 Supply Agreements were part of that anti-competitive effort," even "if such actions were 'compelled' by a foreign government the act of state doctrine would provide no protection to Gulf or GAC" (A. 59a). As defined in *Underhill* and applied by the federal courts, the "doctrine applies only to acts of a foreign state 'done within its own territory' " (A. 59a-60a). And, unlike *Zschernig*, "the causes of action in this case do not involve questionable attempts by states to directly affect the rights of citizens in foreign nations" or involve "the foreign policy attitudes of this or any other state court"; and in this case the New Mexico courts have not directed "pejorative criticism * * * at Canada or any other foreign government" or minutely inquired "into the actual administration of foreign law by a foreign government, or into the rights that such a government affords its own citizens," or

questioned the "veracity of the representations of its diplomats" (A. 67a-68a).[21]

In short, the N.M. Supreme Court simply followed federal law, established by this and other federal courts, in reaching the conclusions which GAC's footnote 5 in effect concedes.

3. GAC's arguments as to why the conclusions thus reached below nonetheless present substantial federal questions are without merit and, indeed, are largely based upon distortions of the opinion below.

(a) GAC's "two serious anomalies in American law" (J.S. 18) are nothing more than the common occurrence of differing laws and circumstances giving rise to separate doctrines. The inapplicability of the Sherman Act to certain state action is based upon an interpretation of that Act,[22] and in some instances this Court has found a limited implied repeal of that Act by other federal regulatory statutes when the language and history of

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[21] Thus, the Court neither "negated" *Underhill* nor "abolished" *Zschernig* (J.S. 17), but, rather, followed *Underhill* and demonstrated the inapplicability of *Zschernig*. Even if "[j]urisdiction is denied an American court when the actions in question were required by a foreign nation acting within the sphere of its sovereignty" (J.S. 17), the Court demonstrated (A. 47a-59a) that GAC has not shown that the actions complained of were required or compelled by Canada, and GAC now concedes that "[n]o foreign government required" the "anticompetitive activities allegedly taken by General Atomic and Gulf in the United States," which is what this case is all about. Thus, "Canada's pervasive, transaction-by-transaction regulation of uranium export prices and terms" and "criminal sanctions" in connection therewith (J.S. 17) are irrelevant to this case. GAC's and Gulf's compliance with Canada's uranium export laws (with which no one quarrels) is a far cry from their participation in a conspiracy which had the express goal, reached "in the context of discussing an American corporation, 'to delineate where the competition was and the nature of its strength as a prelude to eliminating it once and for all.'" A. 40a; also A. 36a.

[22] *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 103-104 (1980); *Parker v. Brown*, 317 U.S. 341, 350-352 (1943). The explanation by the court below as to why GAC has not demonstrated that the GAC-Gulf cartel activities were "compelled" by Canada for purposes of the act of state doctrine (A. 47a-59a) also indicates that GAC could not satisfy the "two conditions" it quotes from *Midcal* (J.S. 18). "It is not enough that * * * anticompetitive conduct is 'prompted' by state action; rather anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Midcal*, 445 U.S. at 104; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).

those statutes disclose a congressional intent that certain activities be regulated thereunder to the exclusion of the Sherman Act.[23] None of the cases relied upon by GAC even mentioned the act of state doctrine or the *Zschernig* rule or involved the interpretation or application of the New Mexico or any other state antitrust laws.

(b) The court below did not refuse to give "credence" to or "ignore" official representations by Canada (J.S. 18-19). While the Court denied an untimely motion by Canada for leave to file an *amicus* brief (A. 430a-432a), which was filed "one year after the case had been argued to this Court" without any "reason [being] given for the delay," Canada's "views * * * were presented to the trial court, and are part of the record on appeal"; the Court "fully considered them in reaching [its] decision"; and it gave "full credence to their representations" (A. 62a-63a n.49). Nor did the Court describe Canada's representations as being only that it "participated" in the cartel (see A. 48a) or otherwise "misrepresent[] Canada's declarations about its own policies" (J.S. 19).[24]

(c) Several of GAC's assertions are based upon an obvious distortion of the N.M. Supreme Court's demonstration (A. 47a-59a) that GAC had not shown — and could not show, at least in the absence of the cartel documents which it had failed to produce — that GAC-Gulf's own cartel activities were so "compelled" by Canada that they could be said to be acts of state even though performed by private companies. Thus, the Court did not "assume[] the power to try the actions and credibility of a foreign government" (J.S. 19), or "demand[] detailed information with respect to all actions of Canada and the cartel,

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[23] *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682-691 (1975); *United States v. National Assn. Securities Dealers*, 422 U.S. 694, 719-730 (1975).

[24] GAC refers only to a Canadian policy that the "setting of export prices and terms for Canadian uranium was an act of state" which Canada required "all Canadian producers" to observe (J.S. 19). The court below did not assert otherwise or have any need to discuss that matter as it had no relevance to the question, which the Court was addressing (A. 47a-59a), of whether GAC-Gulf anti-competitive activities in the U. S. were "compelled" by Canada.

and the situs of all such actions" (J.S. 20), or hold that "plaintiff had a right to examine the Canadian documents to see if there might be evidence of illegal acts by General Atomic and Gulf in the United States" (*id.*). The Court simply held, upon the basis of ample federal authorities not questioned by GAC (see A. 49a-50a, 54a-55a), that GAC had not borne its burden of establishing that GAC-Gulf's own activities were acts of state.[25]

(d) Perhaps GAC's most blatant distortion of the opinion below is its assertion that the Court "held the act of state doctrine inapplicable to this case under" the so-called *Bernstein* exception (J.S. 21). To the contrary, the Court below explicitly recognized that, while the *Bernstein* exception was approved by three members of this Court in *First Nat. City Bk.* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), it "has never gained the support of a majority of the Supreme Court"; but nonetheless the position of the executive and legislative branches of the federal government "is relevant to, but not dispositive of, the question of the applicability of [the act of state] doctrine" (A. 61a). This precisely reflects the positions of the members of this Court in *Banco Nacional de Cuba*.[26] Moreover, the court below did not base its decision upon views expressed by the executive and legislative branches, but merely pointed out that they "supported" the Court's "conclusion," which already had been reached on other grounds (see pp. 15-17, *supra*), "that the act of state doctrine is inapplicable" (A. 60a).[27]

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[25] If parties rely upon an "act of state * * *, it was their burden to prove that act," *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 691 (1976), by demonstrating "that the conduct in question was the public act of those with authority to exercise sovereign powers," *id.* at 694. See A. 50a. In any event, as noted above (pp. 16-17), the court below went on to hold (A. 59a-60a) that, even if the GAC-Gulf activities were acts of state, that doctrine as defined in *Underhill* does not immunize from American laws actions by American companies in the United States, which is all that is involved here.

[26] The plurality opinion, joined by three Justices, approved the *Bernstein* exception (406 U.S. at 760-770). While the concurring and dissenting opinions did not, both Justice Powell for himself (406 U.S. at 774-775) and Justice Brennan for himself and three other Justices (406 U.S. at 790) recognized that the views of the political branches of the federal government were entitled to consideration and weight, even though not dispositive.

[27] The criminal information filed by the Department of Justice against Gulf (to which Gulf pleaded *nolo contendere*), the refusal of the Department of State

4. The only aspect of Part I of GAC's argument that directly concerns the application of the act of state doctrine or *Zschernig* in the context of the Canadian Uranium Information Security Regulations (see pp. 14-15, *supra*) is subpart B(d), J.S. 20-21. The court below on this aspect of the case followed *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), which also involved a foreign law prohibiting disclosure of information that was the subject of discovery (A. 69a-73a). Under that case, as the court below concluded (A. 71a-72a), even if compliance with an order compelling discovery may violate foreign law, that circumstance does not make the discovery order improper (357 U.S. at 204-206). A party's reasons for failing to "comply with the production order, and the willfulness or the good faith of the [party], can hardly affect the fact of noncompliance and are relevant *only* to the path which the District Court might follow in dealing with [the party's] failure to comply" (357 U.S. at 208; emphasis added).

GAC seemingly does not assert, and certainly does not attempt to show, that the court below misconstrued *Societe*, but asserts that *Societe* "did not refer to the act of state doctrine in upholding a court's right to order production of documents unavailable under Swiss non-disclosure law" (J.S. 21). But the "reason for that lack of reference * * * is simple" (A. 72a):

> "Neither in *Societe* nor in this case did the trial court order a litigant to violate the nondisclosure laws of the foreign sovereign. Neither court criticized the foreign sovereign or its laws, or engaged in an examination of such laws or the motivations which gave rise to them. Both courts sought only to maintain the integrity of the judicial process and the efficacy of the laws upon which the cause of action in each case was based. In both cases, those laws reflected very significant policies of this country." *Id.*

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to endorse the Canadian position, and the congressional investigation into the uranium cartel, are clearly inconsistent with any notion that either the executive or legislative branches of the federal government regarded the role of Canada in the cartel to be sufficient to prevent inquiry in this country into cartel activities under either the act of state doctrine or *Zschernig*. It was in that context (see p. 19, *supra*) that the court below considered the matter, and the fact that discovery and available sanctions in criminal proceedings or in congressional investigations may differ from discovery and sanctions in civil proceedings (see J.S. 21 n.11) is irrelevant.

GAC admits that "[n]obody was ordered to violate Canadian law," but asserts that the default judgment was entered "for not procuring such a violation" (J.S. 21 n. 10). That irresponsible assertion has no basis whatsoever. In rulings which GAC does not attack here (except for a claimed denial of due process), the court below devoted much of its lengthy opinion to a detailed demonstration that "the conclusion that the trial court reached — that GAC acted in bad faith and that this misconduct prevented a full and fair trial of the issues in the case — was not manifestly erroneous; indeed, it is compelled by an exhaustive review of the record" (A. 165a; generally, A. 96a-165a) (see pp. 6-11, *supra*). In accordance with *Societe*, GAC "was under a duty to make every effort to obtain the requested information, * * * which included making all efforts to secure a relaxation of the foreign nondisclosure laws to the maximum of its ability," as the court below pointed out (A. 152a), but at no time was GAC required to "procure" a violation of the Canadian nondisclosure regulations or faulted for failing to do so. And, the court below rejected GAC's contention that "under *Societe* the default judgment was an improper sanction" (A. 147a), with detailed references (A. 146a-148a, 152a, 154a) to the discussion by this Court (357 U.S. at 208-213) of the propriety of sanctions.

5. In short, the N.M. Supreme Court has not "escaped" the "principles of the act of state doctrine and the rule of *Zschernig* v. *Miller*" by an "assertion that as a factual matter General Atomic displayed bad faith in discovery" (J.S. 22). Rather, the Court demonstrated that under the decisions of this Court neither the act of state doctrine nor *Zschernig* deprived the New Mexico courts of jurisdiction to order discovery into cartel activities, in rulings that GAC in effect now concedes (J.S. 10 n.5), and further demonstrated that findings of fact firmly grounded in the record established "a course of misconduct [by GAC] in discovery which began at the very outset of the case and ended only with the entry of [the default] judgment" (A. 176a).

6. The Brief for the Government of Canada as *Amicus Curiae* neither endorses GAC's arguments nor adds anything significant to this case. There is no issue here as to whether some principle of law "preclude[s] the exercise of jurisdiction by courts in the

United States over conduct of the Canadian uranium industry *outside the U.S.* in compliance with and in implementation of Canadian laws and policies" (Br. at 3; emphasis added). See, generally, Br. at 2-6. The N.M. courts were concerned with "what an *American* corporation has done in *America*" (see p. 16 and, generally, pp. 14-17, *supra*). Canada concedes that "independent judicial inquiry may be appropriate when, as in this case, there are allegations of conduct going beyond the scope of the foreign government's involvement" (Br. at 7), and the courts below did not assert "jurisdiction over Canada's regulatory laws, policies and actions, or question[] the validity or veracity of Canada's statements as to its laws, policies and actions" (*id.*). See pp. 16-17, *supra*. So, too, this case does not involve "the imposition of default or other sanctions because of a party's failure to produce documents or information, the disclosure of which is prohibited by Canadian law" (Br. at 6-7). See pp. 6-11, 20-21, *supra*. And, whatever may be the relative procedural merits of diplomatic notes as compared to *amicus* briefs (see Br. at 7-10), that also is not an issue here. The courts below received and considered Canada's diplomatic notes, and gave "full credence to their representations"; and the N.M. Supreme Court denied Canada leave to file an *amicus* brief on the adequate state ground that Canada's motion was grossly out of time and provided no explanation for the delay. See p. 18, *supra*.

B. There Is No Substantial Issue as to the Jurisdiction of the New Mexico Trial Court to Proceed to Trial and Judgment

In Part II of its argument (J.S. 23-26), GAC contends that the New Mexico trial court "lost jurisdiction when it unconstitutionally enjoined [GAC] from choosing arbitration rather than trial in Santa Fe" (*id.* 23), in the injunctions which were entered on April 2, 1976 and December 16, 1977 and ruled unconstitutional by this Court in the *Felter* decisions. It further contends that this "retention of jurisdiction * * * conflicts with decisions of this Court that jurisdiction is lost when removal to another tribunal is wrongfully denied" (J.S. 23), relying primarily on *Gordon* v. *Longest*, 41 U.S. (16 Pet.) 97, 104 (1842). Besides being untimely, as demonstrated above, GAC's

argument was squarely rejected in *Felter II* and is, in any event, completely unsupportable. Furthermore, the same argument was rejected in the May 7, 1979 final judgment of the N.M. Supreme Court, and this Court denied certiorari.

Gordon v. *Longest* held that, under the express language of the federal statute governing removal of cases from state to federal courts, once a proper removal application was filed, "it was the duty of the State Court 'to proceed no further in the cause,' " so that "every step consequently taken, in the exercise of jurisdiction in the case" following the erroneous denial of the removal application "was *coram non judice.*" 41 U.S. at 103. Thus the error was a jurisdictional error; if the lower court had decided the issue correctly, it could not have proceeded further in the case.

The trial court in this case, however, did not in connection with its April 2, 1976 injunction make a ruling as to *its* jurisdiction to proceed with the case, but simply enjoined proceedings in other forums. And while *Felter I* held the injunction invalid insofar as it enjoined GAC from proceeding in federal forums, this Court neither held nor suggested that GAC had any right to arbitrate or that the erroneous entry of the April 2, 1976 injunction deprived the trial court of jurisdiction to proceed. Rather, the Court applied the doctrine of *Donovan v. City of Dallas,* 377 U.S. 408, 412 (1964), which expressly acknowledged that, while state courts cannot enjoin proceedings in federal courts, both state and federal courts "may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other." See 434 U.S. at 15-19.

Accordingly, GAC had no basis to complain about the trial court's exercise of jurisdiction prior to the filing of a timely motion for stay of proceedings pending arbitration pursuant to 9 U.S.C. §3.[28] Even though never prohibited from doing so,

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[28] *E.g., Dempsey & Associates v. S.S. Sea Star,* 461 F.2d 1009, 1017 (2d Cir. 1972); *United Electrical, R. & M. Workers v. Oliver Corp.,* 205 F.2d 376, 385 (8th Cir. 1953); *William S. Gray & Co. v. Western Borax Co.,* 99 F.2d 239, 240 (9th Cir. 1938).

GAC did not file such a motion before issuance of the April 2, 1976 injunction or, indeed, until November 30, 1977 (p. 3, *supra*). That motion was denied by the trial court on the ground that GAC was "in default in proceeding with * * * arbitration" (9 U.S.C. §3) and on the ground that the issues were either inarbitrable antitrust issues or inextricably intertwined therewith (A. 318a-319a). The denial of that motion was affirmed on appeal in the May 7, 1979 final judgment of the N.M. Supreme Court (A. 206a-248a), *cert. denied*, 444 U.S. 911 (1979). Accordingly, neither *Gordon v. Longest* nor the *coram non judice* doctrine has any application to the decision of the N.M. trial court to proceed with the trial.[29]

Any doubts about the foregoing propositions were removed by *Felter II*. While granting GAC's petition for an extraordinary writ insofar as it requested that the December 16, 1977 injunction against arbitration be vacated, on the ground that the order violated the decision and mandate in *Felter I*, this Court did not hold that GAC had a right to arbitration or that the New Mexico courts lacked jurisdiction to proceed after issuing the April 2, 1976 or December 16, 1977 injunctions. Rather, the Court specifically denied GAC's petition insofar as it also sought

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[29] Similarly, none of the other cases cited by GAC (J.S. 24-25) are relevant. In particular, the four cases involving arbitration cited by GAC (*id.* 25) merely stand for the proposition that a court loses jurisdiction to proceed with trial if it erroneously refuses to stay trial pending arbitration, *Sibley* v. *Tandy Corp.*, 543 F.2d 540, 544 (5th Cir., 1976), *rehearing denied*, 547 F.2d 286 (5th Cir. 1977); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970, 972 (3d Cir. 1948); or when it erroneously rules that no issues are arbitrable, *Controlled Sanitation Corp.* v. *District 128, Etc.*, 524 F.2d 1324, 1329-32 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976); *Germany* v. *River Terminal Ry. Co.*, 477 F.2d 546 (6th Cir. 1973). Since no such erroneous decision was made in this case, as we have previously demonstrated in opposition to certiorari (M.A. 117-163), there is no conflict with those cases.

GAC's assertion (J.S. 25 n.13) that this case deserves review because of a claimed conflict with an arbitration award (entered without UNC's participation) is absurd. Such a conflict is not a ground for review. See Rule 17.1. In any event, the award has been vacated by a New Mexico Court. M.A. 207-222. GAC's state and federal actions in California to confirm the award have been dismissed for lack of jurisdiction. The New Mexico case and the California federal case are pending on appeal by GAC. The California Supreme Court denied review of the California Court of Appeal's decision, which is reported at 113 Cal. App. 3d 359, 169 Cal. Rptr. 827 (1980).

vacation of the December 27, 1977 judgment denying GAC's motion for a stay pending arbitration, since it did not prevent "GAC from pursuing its arbitration claims in other forums" (436 U.S. at 498 n.2) and also because:

> "Clearly, our opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

The N.M. Supreme Court had *Felter II* before it when it affirmed the trial court order of December 27, 1977, rejecting GAC's argument that the *Felter* decisions deprived the New Mexico courts of jurisdiction,[30] and this Court was presented with the same argument in GAC's unsuccessful petition for writ of certiorari (M.A. 40-48, 51-53). This jurisdictional argument, which this Court has twice rejected, has not gained strength through repetition.

Finally, GAC argues (J.S. 25-26) that the May 7, 1979 judgment is erroneous to the extent that the Court ruled, in agreement with the trial court, that all the issues in the case were either inarbitrable antitrust issues or inextricably intertwined therewith (A. 240a-246a). That issue is not included in the Questions Presented by GAC and thus is not properly before this Court even apart from untimeliness. It was presented to this Court in GAC's petition for writ of certiorari that was denied at 444 U.S. 911 (1979) (M.A. 56-59). As we demonstrated in our opposition to that petition (*id.* 158-162), that ruling accords with federal decisions and presents no issue worthy of review. Furthermore, the issue is moot in light of the determinations by

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[30] As GAC concedes (J.S. 3-4, 23), it presented its jurisdictional argument to the N.M. Supreme Court before the May 1979 judgment. Since that Court expressly held that the trial court's denial of GAC's motion for a stay pending arbitration was not in violation of or inconsistent with the two *Felter* decisions (A. 238a-239a), besides making the other rulings necessary to affirm that order, it is a gross misrepresentation for GAC to state that its jurisdictional argument was "ignored" or "never addressed" by the N.M. Supreme Court (J.S. 4, 23).

the trial court and the N.M. Supreme Court that GAC waived any arbitration rights (A. 217a-234a), a ruling GAC no longer attacks (apart from the jurisdictional argument just discussed). The case with which GAC now claims a conflict on the intertwinement ruling, *Sibley* v. *Tandy Corp., supra*, expressly held that the issues in that case "were not 'intertwined' in the legal sense" with the inarbitrable issues (there, federal security issues). 543 F.2d at 543.

C. There Is No Substantial Due Process Question

As a final effort to manufacture a substantial federal question, GAC asserts that the decision below "conflicts directly" with this Court's *Societe* decision and the due process concepts expressed therein (J.S. 26-30). GAC is able to present its arguments in this regard only by steadfastly ignoring the record in this proceeding and by misreading *Societe*.

1. GAC's initial due process contention, that the New Mexico courts made "no effort whatever" to determine whether UNC and I&M had been "disadvantaged" by GAC's discovery failures (J.S. 27), is contrary to fact. The trial court concluded that the discovery frustrated by GAC sought evidence "highly relevant" to the claims in the case (A. 30a, 254a, 264a); that "UNC and the other parties to this suit have been irreparably prejudiced by this failure" of GAC to make discovery in good faith (A. 257a); and that "GAC's failure in discovery has deprived this Court of evidence which is indispensable to a proper and just adjudication of the issues in this case" (A. 265a). The N.M. Supreme Court agreed (A. 30a-46a). The information sought "could be crucial to the proper resolution of this litigation" (A. 33a). GAC's arguments that such evidence was irrelevant or immaterial were "untenable" and "make no sense whatsoever" (A. 41a). By frustrating discovery, GAC interfered with the "fundamental constitutional right of the party who seeks discovery to a hearing which is meaningful" (A. 178a). Thus, rather than ignoring GAC's contentions in this regard, the New Mexico courts (who were intimately familiar with the record) rejected those contentions on the facts.

This Court's *Societe* decision did not require "a trial at which disadvantage was determined," as asserted by GAC (J.S. 27-28). Rather, this Court held that sanctions dispensing with a trial on the merits were inappropriate if based upon discovery failures "due to inability, and not to willfulness, bad faith, or any fault" of the party failing to make discovery (357 U.S. at 212), as the court below pointed out (A. 147a). GAC's failure to make discovery was "not based on inability; rather it was due to its own bad faith conduct," so the "record here is hardly similar to the one that was before the Court in *Societe*" (*id.*).[31]

2. GAC's contention (J.S. 28) that the default judgment was overbroad and impermissible as "mere punishment" is also insubstantial. This argument was fully addressed and properly rejected by the court below (A. 171a-179a, 199a-204a). That Court found GAC's discovery failures related to every dispositive claim in this case (A. 30a-46a), and that, "weighed in light of the full record" (A. 173a), default was appropriate, especially since lesser sanctions "were not commensurate with the nature of [GAC's] misconduct, and were totally incapable of remedying the dilemma created by that misconduct" (A. 173a).[32]

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[31] After an "exhaustive examination of the record," the court below concluded that "the trial court properly found that GAC had acted in bad faith throughout the discovery process and that the court did not, in the face of such misconduct, abuse its discretion in entering the sanction of a default judgment" (A. 204a). In so doing, the Court demonstrated that its ruling was wholly consistent with *Societe* (A. 146a-159a), and the ruling is also supported by *National Hockey League* v. *Met. Hockey Club, Inc.*, 427 U.S. 639 (1976). Among other things, this Court stated in *Societe* that where a party "deliberately courted legal impediments to production of the * * * records," that conduct would have "a vital bearing on justification for dismissal of the action" (357 U.S. at 208-209). After upholding findings that Gulf had secreted documents in Canada to impede discovery, the N.M. Supreme Court determined that "[u]nder *Societe*, these findings alone may be the basis for the imposition of such a discovery sanction as a default judgment." A. 159a.

[32] As to those issues specifically identified by GAC as having no relevance to its discovery failures, the court below expressly rejected the contention that UNC had committed to supply utilities with uranium "long before the cartel" as being factually in dispute and in any event insufficient to render cartel evidence irrelevant. A. 42a-44a. As to the alleged "release" by UNC, there "was no evidence" that UNC knew "the extent of Gulf's involvement" in the cartel. A. 122a. Under New Mexico law, UNC could not have released a claim or ratified a contract about which full disclosure had not been made. *Dunn* v. *Hite*, 27 N.M. 53, 195 P. 1078 (1921); see *Woods* v. *City of Hobbs*, 75 N.M.

3. GAC's third due process argument appears to rest upon seven affidavits filed by GAC's lawyers which, it contends, required an additional evidentiary hearing on bad faith (J.S. 29).[33] However, the N.M. Supreme Court found that these affidavits "did not demonstrate any need for such a hearing" (A. 168a). As to some lawyers' belief that the cartel had not been an issue, the court below found that "GAC made a unilateral, self-serving construction of the scope of the interrogatories" (A. 169a) and "it is no defense" for GAC lawyers to rely upon a purported "mistake of law" when the rules of discovery call for such questions to be determined in advance by the court (*id.*). The Court also found that the lawyers' claimed lack of intent to conceal the cartel "did not create an issue as to the trial court's finding that GAC had, in bad faith, concealed the existence of the cartel and Gulf's participation in it," a finding supported by GAC's conduct during the proceedings together with the few cartel materials eventually made available (A. 170a).[34]

In any event, GAC's failures to make good faith discovery are "mirrored in the record" (A. 168a). *See In Re Liquid Carbonic Truck Drivers Chemical, Etc.*, 580 F.2d 819, 822 (5th Cir. 1978), *cert. denied*, 441 U.S. 945 (1979); *DiGregorio* v. *First Rediscount Corporation*, 506 F.2d 781, 788 (3d Cir. 1974); *Norman* v. *Young*, 422 F.2d 470, 474 (10th Cir. 1970). As the N.M. Court found (A. 168a):

> "The initial, self-serving misconstruction of the scope of the First Set of Interrogatories, the unjustified failure to

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588, 408 P.2d 508 (1965). Hence, those state law issues could not have rendered the cartel evidence irrelevant. In any event, "[a] party cannot approach its obligation to make good faith discovery however it chooses as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues. * * * At stake is not only the appellees' right to a fair trial on the merits, but also, the integrity of the orders of the court." A. 176a-177a. See, *e.g.*, *National Hockey League* v. *Met. Hockey Club*, *supra*, 427 U.S. at 643.

[33]GAC also asserts (J.S. 29) that "the purported finding of bad faith is not supportable and was a patent attempt to avoid the substance of *Societe*." That assertion is not included within the Questions Presented by GAC, and is belied by the extensive demonstration by the court below that the bad faith findings are supported by the record. See A. 91a-165a and pp. 6-11, *supra*.

[34]The Court also found that the affidavits were so contradicted by each other, by prior statements of the same attorneys, and by the historical facts of record that "those affidavits are themselves evidence of the lack of good faith on GAC's part." A. 168a-170a; also A. 113a.

> include cartel information in the supplemental answers to those interrogatories, the contradictory representations GAC made to the trial court at various stages of the proceedings, the series of inadequate answers to the Second Set of Interrogatories, and the unfulfilled commitments to produce cartel documents, are all apparent from the face of the record."

Plainly, "[n]o amount of oral testimony could alter those aspects of the history of this litigation." *Id.*

Evidentiary hearings were held in this case,[35] even though one is not required where bad faith is manifested in the record. See *National Hockey League v. Met. Hockey Club, Inc., supra; Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Norman v. Young, supra.* GAC filed extensive briefs, offered proposed findings and submitted numerous affidavits concerning its failure to make discovery in the trial court. These briefs and affidavits, together with the written materials submitted by other parties and the entire record in the case, fully recounted the circumstances of GAC's non-compliance with its discovery obligations (A. 171a) and obviated any need for another evidentiary hearing. *Margoles v. Johns*, 587 F.2d 885, 888-89 (7th Cir. 1978). In these circumstances, the hearings held below were "appropriate to the nature of the case," which is what due process requires. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950); A. 167a-168a.

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[35] Contrary to any implication in its Jurisdictional Statement, GAC did receive numerous opportunities to present evidence to resist UNC's and I&M's charges of bad faith. Numerous hearings were held dealing specifically with GAC's discovery failures, including two where live testimony was taken. A. 104a-105a, 154a-157a; see pp. 7,9, *supra*. The trial court warned GAC on at least five occasions that sanctions, including default judgment, would be seriously considered if there was a failure to make good faith discovery (A. 166a), and, after numerous discovery hearings, repeatedly found GAC's conduct deficient. *Id.*

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal for lack of jurisdiction and deny certiorari. If the case is properly here on appeal, it should be dismissed for want of a substantial federal question or the judgment below should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

28 U.S.C. §1257 (1976)

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

[Act of June 25, 1948, c. 646, 62 Stat. 929; as amended July 29, 1970, Pub. L. 91-358, tit. 1, §172(a)(1), 84 Stat. 590.]

Rule 54 of the New Mexico Rules of Civil Procedure, N.M. Stat. Ann. (1978)

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not contain a recital of pleadings, the report of a master or the record of prior proceedings.

(b) Judgment upon multiple claims or involving multiple parties.

(1) Judgment upon multiple claims. Except as provided in Rule 54(b)(2), when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(2) Judgment involving multiple parties. When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment. If such provision is made, then the judgment shall not terminate the action as to such party or parties and shall be subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when expressed provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the state, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within five days thereafter, the action of the clerk may be reviewed by the court. [As amended, effective October 1, 1969, and April 20, 1973.]